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UNIFORMITY OF COMMERCIAL LAW ON THE AMERICAN CONTINENT.*

ANGLO-AMERICAN lawyers are not, as a rule, believers in codification.[1] Hence, as legislation is the only agency through which in practice a uniform commercial law for the American continent may be looked for, you might, with some degree of reason, anticipate that I should be opposed to such a project. I may say, however, that I do not at all share the orthodox common-law antipathy toward legislation and codification. I have no doubt that a legislative restatement of the law and a juridical new start upon the basis of such a restatement are inevitable in English-speaking countries for the same reasons that have brought them about elsewhere. To an audience of jurists trained from another standpoint, to whom the Anglo-American conception has not been taught as part of the *fundamenta* of law, one need not argue this. Divested, then, of all prejudice which, in the eyes of most common-law lawyers might attach to such a proposition by reason of the necessary means of its accomplishment, let us ask whether and how far a uniform commercial law throughout the American continent is desirable; what the con-

* Read before the Pan-American Scientific Congress at Santiago, Chile, December 30, 1908. The subject was chosen at the suggestion of the American Delegation to the Congress. Uniformity of Commercial Law was also the subject of a paper by Dr. Pedro J. Rada, a jurist from Peru.

[1] Thus, Mr. Smith said that codification of mercantile law would be a "national evil." Smith, Mercantile Law, 14.

See also the Introduction to Lord Halsbury's Laws of England (1907). For the views of lawyers in the United States upon this subject, see Carter, Law, Its Origin, Growth, and Function; Clarke, The Science of Law and Law-Making.

There seems to be some change of sentiment on this subject in England. See the remarks of the English Attorney General at the Annual Meeting of the Bar in 1908. Law Times, vol. 125, p. 44.

ditions are, if any, that would operate in favor of such a project: what difficulties would have to be encountered and overcome, and, finally, in view of all the conditions, how far, if at all, such a project is feasible at present or in the near future.

This is an era of universality and internationality. The thinking world is tending strongly to insist upon breaking over narrow local boundaries and upon looking at things from a world-wide point of view. This is not manifest alone in the rapid strides making in international law and the great increase of interest in that subject. Art, science, economics, labor and fraternal organizations, and even sport are tending to become international. The growing frequency of international congresses and conferences upon all manner of subjects emphasizes this breaking of local political bonds. The sociological movement, the world over, is causing men to take a broader and more humane view, is causing them to think more of society and hence more of the world-society, is causing them to focus their vision less upon the individual, and hence less upon the individual locality. In such a time, it is to be expected that interest should revive in the conception of a universal law,[2] and that the seventeenth-century conception of a law of nature applicable to all men at all times under all circumstances should take on a modern form and in that form should excite the attention of jurists. In the Helenistic world, in the world of the full-fledged Roman Empire, in the world of the universal church and in the world of the new-born international law, this conception was a potent one. In the world of universal art and universal science and universal business we must expect it to re-appear. But we may as well dismiss at the outset the chimera of a universal civil law.[3] Under the reign of the eighteenth-century theory of natural law, elaborate systems of Cloudcuckoo-town law, applicable to the whole race, were much in vogue. Today, under the reign of the new pragmatic philosophy, utilitarian politics and sociological jurisprudence, universal civil law is no more to be thought of than world-empire. In civil law, the juristic problem of the present is to divorce law from "an abstract and unreal theory of state-omnipotence on the one hand, and an atomistic and artificial view of individual independence upon the other," to recognize the facts of the world and of society and the relation to them of social authority, and to make them the basis of law as they are the

[2] See Zitelmann, Weltrecht, Allgemeine Osterreichische Gerichtzeitung, 188, 193.

[3] Throughout this paper the terms civil law and commercial law are used in the continental sense given currency by the French codes.

basis of life.[4] Until, then, the facts with which civil law has to deal become world-wide, until the life of the local community becomes cosmopolitan and universal, universal civil law will remain a dream.

With respect to commercial law, however, the case is quite different. The most hide-bound analytical jurist must feel a difficulty in addressing commands to buyers and sellers beyond the seas. Grant, if we will, that administrative law, criminal law, the law of inheritance, the law of the family, the law governing transfers of land rest upon positive foundations and arise from the will of the lawmaker, it must nevertheless be evident that sea-law, the law of international transportation, and the law governing sales between buyers and sellers in different lands must be regarded as springing in part from many sovereigns, whose commands may conflict, or else as a recognition by each of the usages of world-wide trade, to which each makes its local regulations conform.[5] Montesquieu recognized another, but related, distinction between civil and commercial law. "The affairs of commerce," he says, "are but little susceptible of formalities. They are the actions of a day, and are every day followed by others of the same nature. Hence it becomes necessary that they should be decided every day. It is otherwise with those actions of life which have a principal influence in futurity, but rarely happen. We seldom marry more than once; deeds and wills are not the work of every day; we are but once of age."[6] In other words, the subject-matter of commercial law is in a sense universal in time as well as in space; the events that form the subject-matter of civil law are local in time and in space. Civil law, as its name implies, must in its details, at least, be local. It deals with matters of local moment. It subserves local needs. Commercial law, on the other hand, deals with matters of world-wide moment. It subserves universal needs. In consequence, to achieve its end, it must be more or less universal. This is recognized in the countries of continental Europe and in Latin American countries by separate civil and commercial codes. It is recognized to some extent in the United States in the doctrine of the Federal Supreme Court that questions of commercial law are matters of "general jurisprudence."[7] It is recognized to some extent in decisions of State courts in the United States in which the doctrine of *stare decisis* is relaxed where necessary to bring decisions upon questions of commercial law into har-

[4] Figgis, From Gerson to Grotius, 152. See my paper, Mechanical Jurisprudence, Columbia Law Rev. December, 1908.

[5] See Schmölder, Die Billigkeit als Grundlage des bürgerlichen Rechts (1907).

[6] L'Esprit des Lois, Liv. xx, Chap. 18.

[7] Swift v. Tyson, 16 Pet. 1.

mony with the general course of decision in other States.[8] But the attempt of the Federal Supreme Court to establish a "general jurisprudence" in matters of commercial law came to nought. The rule it laid down in *Swift* v. *Tyson* was rejected by several of the State courts, and it has required legislation to produce uniformity.[9] Moreover the State courts in time made less and less effort to harmonize their decisions upon commercial subjects, so that ultimately there were a large number of disputed questions to be settled in the Uniform Negotiable Instruments Law and the Uniform Sales Law. We may say, then, that the distinction has been recognized in the United States, but that it is only just acquiring practical effect through the activities of the Commissioners on Uniform State Laws.

Originally, the law-merchant was to a great extent a uniform customary law of an international mercantile community.[10] When the development of national laws on the continent and the rise of the conception of the State as the source of law began to supersede this and to absorb the law-merchant into local systems, the influence of the seventeenth and eighteenth-century commentators upon mercantile law, which was strong in England in the eighteenth and survived in New York till almost the middle of the nineteenth century and the prevalence of the law-of-nature theory in legal philosophy tended to preserve uniformity. Finally the French *Code de Commerce* of 1807, which long served as the model for codes of commercial law, furnished a common basis for legislation and brought this uniformity down to modern times. For these historical reasons, as well as from the nature of the subject, there is today more uniformity in commercial law than in any other field of the law. But the causes which have tended and are still tending to localize the civil law in every country have been operating powerfully upon commercial law. And a special cause, peculiar to this branch of the legal system, has co-operated. "In contrast with the general civil law," says Goldschmidt,[11] "commercial law occupies the position of a pioneer of reform. Developed under the controlling influence, so compelling towards their interests, of the thrifty, usually trained and far-sighted, classes of the population—the captains of industry, the shipowners, the wholesale merchants, the masters of finance—it

[8] e. g. Aud. v. Magruder, 10 Cal. 282.

[9] See 3 Kent, Comm. 80, 81 and notes to 14th ed. Cf. also the diversity of holdings on the point involved in Old Dominion Copper Mining and Smelting Co. v. Lewisohn, 210 U. S. 206; especially the dissenting opinion of Knowlton, C. J. in Old Dominion Copper Mining & Smelting Co. v. Bigelow (Mass.) 89 N. E. 195, 220.

[10] Goldschmidt, Universalgeschichte des Handelsrechts, 1, 142.

[11] Universaligeschichte des Handelsrechts, 1, 11.

inclines, in consequence, to penetrate the civil law at large with its tendencies, and, in that it then passes into the latter, to contract materially its own sphere, while at the same time its scope grows once more through the accession of new rules, expressing special needs of commerce." Both of these are localizing processes. The progression from law merchant to civil law and the incorporation of the former in the latter gives to the one the local, one might say the provincial character of the other. Just as the *jus gentium* became simply a source of what was distinctly *Roman* law, and the law-merchant, when incorporated into the body of the common law of England under Lord Mansfield, became as thoroughly common-law as the oldest branches of English law, the commercial law of continental European nations has been segregating into systems scarcely less distinct than the several systems of civil law. So too the new commercial law which is forming continually everywhere, is forming under the influence of ideas of national or local law, under the influence of a legal philosophy which rejects the universal ideas and ideals of the eighteenth-century jurists, and through the agency of the most localizing of all law-making agencies, legislation. On the whole, if commercial law is still the more universal of the two, we must say that it has been tending to become only less provincial than civil law.

Hitherto commerce has tended to produce uniform law largely through its activity as an agent of political unification. It is a commonplace to say that trade has been the chiefest factor in the building up of large states. The United States owes its existence as a nation to the commercial situation in the thirteen colonies under the Confederation. The germ of the Constitutional Convention is to be found in a resolution of the legislature of Virginia providing for a conference of commissioners "to take into consideration the trade of the United States, to examine the relative situation and trade of the States, to consider how far a uniform system in their commercial relations may be necessary to their common interest and their permanent harmony."[12] Commercial interests led the States of Germany into the *Zollverein* that culminated in the present German Empire. We are told that only trade considerations sufficed to reconcile the Scotch to the Union with England which they rightly anticipated would prove fatal to their national existence.[13] Of the eleven grounds urged for the formation of the Australian Commonwealth, five were distinctly commercial, and one in particular was

[12] 1 Story, Constitution, § 272.

[13] Bryce, Studies in History and Jurisprudence, Essay IV.

"the need for uniform legislation on a number of commercial and industrial topics."[14] It is said that one of the chief reasons for the failure of the attempt to preserve the union between Sweden and Norway was the absence of any strong commercial motives for keeping it up. In the past, then, commercial growth and closer commercial relations have tended to break down State sentiment and to bring about political union. Doubtless the exigencies of interstate railway transportation are operating in the United States today to break down State autonomy and to make for further centralization. If this were to be the mode by which a uniform Pan-American commercial law were to be looked for, there would be an end of the question. But today there is a changed condition in an important particular. Formerly economic expansion followed political expansion. Today trade unification goes ahead of political unification and beyond it. "It is thus," says M. Worms, "that actually it has established for international traffic a veritable human unity, while politically, diversity and antagonism of states still subsist."[15] Universal empire is not necessary to universal trade. Political union is not necessary to commercial union. A common civil law is not involved in a common law for international commercial transactions. We now recognize that results may be achieved quite as much by legislative recognition of universal principles as by judicial or juristic recognition of them. The shifting of the growing-point of law from juristic speculation or judicial decision to legislation does not require a rejection of universal principles. On the contrary, international conferences and congresses may work them out in the light of the experiences of all peoples, and they may be presented to legislators with an assurance that could not obtain were jurists to deal with the matter in the light of academic discussions in the books or judges in the light of reported decisions.

There is nothing new in propositions for a uniform commercial law. The obvious advantages which would flow from a general uniformity of commercial laws, as well as the rise of an international spirit among men, have urged many to propose the adoption in all countries of a uniform code of commercial law—an International Commercial Code.[16] Jurists also have attempted to construct theor-

[14] Id. Essay viii.

[15] Philosophie des Sciences Sociales, ii, 109.

[16] Lyon-Caen et Renault, Traité de Droit Commercial, i, § 49. Tonze et de Parien, D'un projet de Code de Commerce international; Cohn, Beiträge zur Lehre vom Einheitlichen Wechselrecht; Meili, Staatsverträge über das internationale Konkursrecht; Meyer, Weltwechselrecht; Meyer, Die Vereinheitlichung des Wechselrechts, Archiv fur Rechts und Wirtschaftsphilosphie, i, 257.

ies by virtue of which universality in commercial law may be approached and even attained judicially. The most notable attempt of this sort is that of Dr. Jitta,[17] an attempt that should make a profound impression upon the theory of conflict of laws. He sees clearly the futility of the ambitious schemes of natural law based upon purely metaphysical notions which have been devised in the past. The kernel of truth in the labors of those who projected these schemes was recognition of the need of transforming into a community of law "in accord with the exigencies of active life ordered by reason," the community of fact of mankind. The fatal defect in their labors was that they pressed their doctrine too far and formulated too many rules of assumed general application. The criterion which Dr. Jitta adopts, "the reasonable order of universal human society,"[18] is not in form a new one. His real contribution is in applying it in the light of the pragmatic philosophy, the *Wirklichkeitsjurisprudenz*[19] of the present day, pointing out universal principles that will clearly govern certain states of fact or certain relations without being too ambitious to lay down universal rules.[20] There are undoubtedly certain common juridical convictions of nations. One may ascertain these by study of national juristic speculation and local judicial decisions. Above all, there are courses of legislation common to civilized countries today which indicate universal convictions of what is demanded by social order.[21] Accordingly, if A in one country sells goods to B in another, in his view the transaction is governed legally, from the beginning, by the only law which was common to the parties, the basis common to sales in every civilized country, the *droit commun international.* This return to the Roman idea of a *jus gentium,* brought about by an inadequacy of the theory of local law to meet the demands of world-wide commercial transactions, would promise much, if we were in an era of legal growth through juristic speculation or judicial decision. But the latter agencies appear to have spent themselves for a season, and the most we may hope for from them is a formulation of principles and detailed working out of rules to be given final shape by legislation.

Private International Law has regarded itself as the modern *jus gentium.*[22] But not until the theory of Dr. Jitta have we had a real

[17] La substance des obligations dans le droit international privé.

[18] Ibid, i, 20.

[19] Sternberg, Allgemeine Rechtslehre, i, 188.

[20] Jitta, La substance des obligations dans le droit international privé, i, 18, 20.

[21] Ibid. i, 183. See also Riesser, Grundgedanken in den Kodifizierten Handelrechten aller Länder.

[22] Heffter, Das Europäische Volkerrecht, 2, See Wheaton, International Law, § 10.

jus gentium. Rather we have had rules of civil law for determining the intention of the parties in cases where in fact they had no thought of selecting any particular law to govern the transaction in hand, and no idea that it was necessary to do so, or for referring the question to the law of this state or that state, to be adopted by the tribunals of the state where the cause is pending *pro hac vice.* As he points out, if a Frenchman sells to an American, the parties rely on the fact that there are sales in France and sales in America, and see no necessity of branding them as French sales or American sales. Common sense should indicate that this practical basis of business affairs should be the basis of the law governing them. In truth it is likely that the current theories are, as so often happens in the growth of the law, afterthoughts advanced to cover the adoption of reasonable rules which their authors could not justify by traditional conceptions.[23] This is the broadest and boldest practical theory of a universal law yet elaborated. But it covers only the subject of obligations, as dealt with in conflict of laws, and requires much painful working out in detail in its application. Granting this, as a critic has said: "It is the system of the future. Increasing cosmopolitanism appears * * * certain to demand a return to the *jus gentium* sooner or later. The present system is a survival from the time of tribal or racial law, when a person's liabilities were estimated according to his membership of a given community."[24] Jurists have pointed the way. In an age of legislation this is probably all that they can do. As Dr. Jitta himself says, we must now look chiefly to international conferences and scientific congresses, which shall bring home to local law-makers the common juridical convictions of nations.[25]

Thus it is generally recognized that uniform legislation must be looked to for the desired universal commercial law. The notion of an international commercial code imposed *ab extra* is generally recognized to be impracticable.[26] Uniformity is to be sought not through codification in that sense, but through the adoption in different states of uniform statutes worked out by international conferences. Moreover, the purpose of such statutes must be not so much to lay down dogmatic rules to be applied to designated states of fact, as to require the courts to decide according to the nature of the juridical relations involved in causes with reference to their

[23] Jitta, op. cit. i, 148.
[24] Baty, 20 Juridical Review, 112.
[25] Jitta, op. cit. i, 23, ii, 22.
[26] Lyon-Caen et Renault, Traité de droit Commercial, i, § 49.

bearing on the demands of universal commercial activity.[27] The notion of bringing about uniformity in this way is not at all new. In 1880 the International Congress of Jurists at Turin considered the desirability of uniform legislation with respect to certain phases of bankruptcy and devised a project whereby the principal commercial seat of trader's business was to be the sole forum of bankruptcy proceedings and the judgments of the local courts were to be given conclusive force everywhere, requiring merely for their extra-territorial enforcement application for an order in the nature of an *exequatur*. This project was discussed by the Institute of International Law. Still later a briefer project was adopted at the Hague Conference for Promoting Private International Law, in 1904.[28] In 1880 a uniform law of bills and notes for the Scandinavian States was adopted and those States have also adopted a uniform maritime law.[29] In 1890 a convention established common rules for the international carriage of goods by railways, to which Germany, Austria-Hungary, Belgium, France, Italy, the Netherlands, Russia and Switzerland, were parties and to which Denmark adhered subsequently. In 1906 an international convention was concluded with reference to wireless telegraphy, to which twenty-seven powers were parties, six of them American. But the field in which the movement for uniform legislation has been most active has been the law of commercial paper. The action of the Scandinavian countries in 1880 has already been mentioned. In 1885 an international congress on commercial law at Antwerp considered uniform legislation as to maritime law and commercial paper.[30] This congress continued its work at Brussels in 1888.[31] In 1904, through the action of economic societies in Germany, Austria and Hungary, a movement was inaugurated for a uniform law with respect to checks. This resulted in an international conference at Budapest in 1907, which considered at great length necessary legislation to bring about uniformity between the three countries.[32]

But, great as the progress has been in this direction, it is doubtful whether, even in Europe where the greatest advance has been made and is making, any general uniformity of commercial law is to be

[27] Jitta, i, c.

[28] Meili, Moderne Staatsverträge über das internationales Konkursrecht (1907).

[29] Lyon-Caen et Renault, Traité de droit Commercial, i, § 49.

[30] Actes du congrès international de droit commercial d'Anvers. See articles by M. Lyon-Caen, Journal de droit international privé, 1885, 593, and by M. Daguin, Bulletin de la Societé de legislation comparée, 1886, 570.

[31] Actes du congrès international de droit commercial de Bruxelles.

[32] See Cohn, Das Weltscheckrecht und die internationale Konferenz in Budapest, Archiv fur Rechts und Wirtschaftsphilosophie, i, 565.

expected in the near future. Dr. Meili, in discussing uniform bankruptcy law, admits that he does not anticipate an early adoption of such a system by Europe and much less by the world at large. As he points out, nations must be educated more nearly to the same level before much uniform legislation is possible. Different peoples have advanced in different degrees in the matter of their attitude toward public faith, the establishment of credit and the thorough organization of courts and businesslike procedure necessary to give effect to commercial law. As Dr. Meili puts it, "the romantic has no place in jurisprudence."[34] Advances in international law, he says, are not to be made at a gallop. They require wisdom, diplomatic talent and time.[35]

Granting that uniform commercial law is desirable and that a universal commercial law is as yet impossible, are there any conditions which favor an attempt to introduce uniform commercial legislation throughout the American continent? To my mind, in view of the greater uniformity, to begin with, of commercial law, for historical reasons, which has already been adverted to, there are three factors of no mean importance which might make for the success of such a movement in America. The first is the doctrinal movement for unity of law which is now strong among jurists and teachers of law in the United States. The judicial law-making power of Anglo-American courts, even more than the activities of forty-six state legislatures, has been actively destroying the unity of our traditional common-law system in the United States. Jurists and teachers of law have become alarmed at the situation and it is significant that the cry is strong for the teaching and studying of "general law."[36] International law affords a striking example of the practical results which juristic theory may accomplish. The juristic movement for uniformity of law in the several states of the Union cannot fail to result in a general feeling for universality in law wherever practicable and advantageous.

A second factor which should operate strongly in favor of a project for uniform commercial legislation throughout the American

[34] Meili, Moderne Staatsverträge über das internationale Konkursrecht, 88.

[35] Ibid. 122.

[36] See the discussion before the Association of American Law Schools at Portland in 1907, Rep. Am. Bar Assn. xxxii, 1012; the address of Professor Kirchwey as president of the Association at its meeting at Seattle in August, 1908, Rep. Am. Bar Assn. xxxiii, 919; and the papers of Judge Schofield, Uniformity of Law in the Several States as an American Ideal, xxi Harvard Law Review, 430, 510, 583. Compare also the memorial addressed to the trustees of the Carnegie Institution by a committee of the Association of American Law Schools, appointed at the meeting in 1907; Reports American Bar Association, xxxi, 1032.

continent is the more universal view of law to which jurists in Latin countries have always inclined. The fortunate ambiguity of *jus* and its analogues in the Latin tongues—*droit, diritto, derecho,* —which preserves the consciousness of a connection which the English *right* and *law,* however conducive to clear thinking, tend to obscure, of itself makes for universality. But over and beyond this Latin America much more than English America is, as it were, a soil prepared for universality. It has inherited a universal tradition. The Spanish jurist-moralists of the seventeenth century, while not the sole, are yet the chiefest exponents of that conception of law as the embodiment of eternal justice which has always been our main reliance against the analytical conception of law as the command of a law-giver. Suarez, for instance, includes in his discussion of law, notions as far apart as the rules of games and the laws of economics. He felt that they were laws in that they expressed in some form an idea of right, in that they were concerned with some notion of justice, in that they had to do with an ethical conception prior to and above the rule or law in the stricter sense. This was the atmosphere in which international law grew up and without which it was impossible to have such a system. The recognition of political facts coupled with ancient ideals of unity and the older notion of law as an eternal verity, upon which these jurists insisted, has produced a mode of legal thinking, wider and more universal than that which prevails in English-speaking countries, and creates an atmosphere in which a universal commercial law may easily grow up.

A third condition which would favor a project for uniform commercial legislation in America is the sociological movement, strong the world over, but particularly strong and forceful in the active and progressive peoples of the New World. In jurisprudence this sociological movement has built upon and made rational and scientific the old notion of natural law. The appeal from purely legal reasoning to general considerations of utility, of justice and of adaptation to human activities which it involves, must make for universality. In insisting that we must not forget the end of law in the means, in taking us back on every occasion to reason as counter-distinguished from legal conceptions, this new version of natural law which we are calling sociological jurisprudence is a powerful force against the localizing tendencies of the analytical theory and of legislation.

On the other hand, there are formidable difficulties to be met. Some of these are inherent in the project itself, some of them are due to peculiarities in Anglo-American legal thinking and some

arise from the diversity of conditions upon the American continent.

A difficulty of no small moment is to be noted in the very notion of codification. We are not so convinced as were the eighteenth-century jurists that codification is a panacea. We do not expect, as they did, that law shall spring Minerva-like from the head of a law-giver. Pragmatism in philosophy and the theory of adaptation to ends in jurisprudence have overthrown the basis upon which the natural-law jurists proceeded. In the Middle Ages everything, politics, economics and even religion, was thought of under legal forms. In the modern world this legality outside of jurisprudence has given place everywhere to utility. Whereas formerly everything was expressed in legal phraseology, today utility or adaptation to the end or result is impressed upon our terminology. In explaining natural phenomena, we think now of efficient, not of final causes. So, in politics and in jurisprudence, institutions and rights must show some practical utility if they are to be permitted to persist. Law is no longer sacred or mysterious. Even jurisprudence is more and more coming to the sociological point of view. To bring this about was the great work of Ihering.[37] Prior to his writings, the method of jurisprudence was to take a legal conception and from it to deduce every rule. This indeed was the method in all sciences in the first half of the nineteenth century. Ihering taught us to take as our first criterion, "does the rule work in practice?" In dealing with commercial law his method would be to determine what the rule is that best accords with and gives effect to sound business practice. But, if this is the point of view of the present and of the future, it is obvious that the work of codification will be much more difficult than it was formerly conceived to be. Not legal conceptions merely, but practical economic and social conditions must be studied and business men must be taken into council as well as jurists, practicing lawyers and judges.

Another difficulty inherent in the project is that the present is an era of legislation and in all eras of legislation the imperative theory of law is dominant. The more that law comes to be felt to be merely positive, to be merely the command of a law-giver, the more difficult it is to enforce universal considerations. Legislation always tends to produce localization in law. It lacks the check of universal theory which restrains jurists and judges. But the imperative theory of law goes along with the advance of legislation and with the triumph of centralized bureaucracy throughout the world against which the common law in the United States is fighting a

[37] See Sternberg, Allgemeine Rechtslehre, i, 188.

slow retreat. Unknown in Germany until the last quarter of the nineteenth century, it has waxed strong there with the growth of national legislation under the empire. In England and the United States, the chief parliamentary countries of the world, the analytical theory has almost stood for legal science. Even in Latin countries the failure of Teutonic ideals of law and government, which subordinate the State and its agencies to law, must necessarily make for the imperative theory. It is true that with the improvement of legislative methods and the working out of scientific theories of legislation, we may hope that a real *Wirklichkeitsjurisprudenz* may be brought about by means of statutes. Legislative investigations through committees, the working out of measures in advance by associations and congresses and conferences are tending to give to legislatures a breadth of view as to demands of society with respect to law which jurists or judges were not able to attain in the past. For a long time to come, however, while this relatively new agency of law-making is perfecting, we may be certain that legislation and the resulting imperative theory of law will work against universality. Not only will this attitude of lawyers and jurists prove a general factor against a project for uniform commercial law, but the Anglo-American repugnance to codification will prove especially formidable in the United States and doubtless in Canada. As half of the American continent in point of territory and more than half in point of population is skeptical as to the efficacy of legislation as an organ of private law and does not regard codification as desirable, all schemes for the unification of commercial law must be framed in the light of the settled attitude of the Anglo-American common law.[38]

The strength of the idea of nationality in the modern world is also a difficulty to be reckoned with. Strong as is the movement for internationality among thinking people, the number of those who have a living sense of the oneness of the human race is not large. It is said that the fundamental idea of the philosophy of law must be protection of society.[39] While everyday experience teaches that the universal mercantile community is a fundamental fact, the abstract conception of such a community, whose interests are to be protected and conserved by a universal commercial law, is not easy for mankind at large to grasp. Moreover, the survival of unfair modes of dealing with the alien in law and legisla-

[38] See Baldwin, Introduction to Two Centuries Growth of American Law, ii; Hornblower, A Century of Judge-made Law, vii, Columbia Law Review, 460.

[39] Ratzenhofer, Soziologie, § 35.

tion is by no means everywhere unpopular. In popular governments, justice to the alien is not always easy to attain. Yet the fundamental principle of universal commercial law must be to treat citizen and foreigner alike.[40] We have not succeeded entirely in giving effect to that principle as yet between the several states in the United States. Despite constitutional provisions, at many points the courts find themselves compelled to allow local statutes and rules for procedure directed against the alien to operate unchecked.[41] It goes without saying that we must have a widespread sense of the necessity of justice to the alien internally and must have internally a uniform commercial law before we are ready for an international legal system. But, in truth, uniform commercial law is just beginning to be attained in the United States. It is but eighteen years ago that the Conference of Commissioners on Uniform State Laws began its activities. As a result of its labors a uniform negotiable instruments law has been formulated, which has been adopted in thirty-one states and four territories, including the District of Columbia. That law, which was formulated many years since, remains to be enacted in fifteen states and four territories. It has drafted a uniform warehouse-receipts act which as yet has been adopted in but ten states. Its uniform sales act has, as yet, been adopted in but five states and one territory. Attempts to enact these statutes in many states have failed, and for a long time to come it will require vigorous exertion on the part of those interested in the movement to secure even this beginning of a uniform commercial law within the United States. A number of obstacles which will have to be encountered will operate specially in the United States. In the first place, the distinction between civil and commercial law has not been recognized in English-speaking jurisdictions since Lord Mansfield incorporated the law-merchant into the English common law. Again, we must reckon, whenever legislation is contemplated with a settled and widespread belief on the part of common-law lawyers, that Anglo-American legal conceptions inhere in nature. A striking instance of this is to be seen in the obstinacy with which American jurists adhere to the common-law notion that criminal jurisdiction must be limited to the *forum delicti commissi.*

I need not say that jurists and law teachers are doing what they can to break down such feelings. Nevertheless, when practical legislation is in contemplation, they must be reckoned with. We must

[40] See Meili, op. cit. 91.

[41] See, for instance, Chambers v. B. & O. R. Co., 207 U. S., 142, 149; Anglo-American Provision Co. v. Davis Provision Co., 191 U. S. 373.

remember also in this connection that the natural-law idea has never been congenial to English-speaking peoples and in consequence universality will not appeal to them with the same force with which it appeals to those trained in Latin systems of jurisprudence. Not only this, but a genuine contempt for legal theory has always been more or less characteristic of the Anglo-American lawyer. Lord Esher thanked God that English law was not a science. Professor Dicey tells us that "Jurisprudence stinks in the nostrils of a practicing barrister."[42] The United States is pre-eminently the land of the business spirit. The business man has been for a generation our type and exemplar. Hence, not unnaturally, lawyers have come to be pure business men. They, too, have the business ideal of making their business pay. They, too, have been judged by the money they have made, not by the service they have done to justice and legal science. Hence, among probably the most businesslike of all peoples, commercial law has lagged and it is not too much to say that in the point of legal procedure the United States is far behind all English-speaking peoples. But a generally diffused sense for sound legal theory and a modern organization of courts and simple, flexible procedure adapted to the exigencies of business, must necessarily precede any useful or practicable scheme of uniform commercial law.

To what extent, then, in view of the difficulties suggested, is the project of a uniform commercial law for the American continent feasible? If we use commercial law in a wide sense, it must be said at once that the project is not feasible. MM. Lyon-Caen and Renault have pronounced such a project for Europe chimerical,[43] and it seems to me even more chimerical for the American continent. In a narrower sense, however, it is conceivable; and this leads us to consider the scope of the juristic *jus gentium* and of the commercial law of Latin countries upon the basis of which such a project must largely proceed. The most difficult point probably in the juristic theory of a modern *jus gentium* is to determine what transactions fall within its scope. It is apparent at once that diversity of citizenship is an impossible test. In the Roman law, the *jus gentium* devised for transactions between foreigners or between citizen and foreigner soon came to govern transactions of certain types absolutely without respect to the parties thereto. In the United States the attempt of the Federal Supreme Court to bring forth a general jurisprudence by virtue of the jurisdiction of Federal courts in

[42] 5 Law Mag. and Rev. (4 series) 386.
[43] Op. cit. i, § 49.

cases involving diversity of citizenship has led to a situation in many states in which one result may be obtained in the State courts and another in the Federal Courts, and to State legislation intended to cut off access to Federal Courts. To have two laws for the same act will result inevitably in jealousy. A line, then, must be drawn according to subject matter, and granting that the real subject of the *jus gentium* is commercial transactions and relations, it must be limited to those commercial transactions and relations which are of universal occurrence and in respect to which universal ideas prevail among business men. The German *Handelsgesetzbuch* defines as mercantile traders subject to its provisions, first, persons permanently engaged in business for profit, as bankers, carriers, publishers, buyers and sellers of goods, insurers, factors or brokers; and, second, persons permanently engaged for profit in any other business or trade, except agriculture, carried on in a manner and on a scale usual in the case of the more important mercantile trades, provided the trade name of such business is entered in a mercantile register.[44] The French *Code de Commerce* embraces, using the terms familiar to English-speaking lawyers, (1st) partnerships and trading companies (chiefly subject, however, to subsequent legislation); (2nd) stock and produce exchanges and brokers; (3rd), pledges, factors and carriers; (4th) sales; (5th) commercial paper; (6th) admiralty and marine insurance; (7th) bankruptcy, and, (8th) the jurisdiction and procedure of commercial boards. The German idea of the scope of commercial law, as we may gather it from standard texts, embraces (1st) sea law; (2nd) sales; (3rd) factors, commercial agents and brokers; (4th) commercial paper; (5th) stock and produce exchanges; (6th) publishers; (7th) transportation; (8th) banking; (9th) warehousing and warehouse receipts; (10th) trading companies, and (11th) insurance.[45] Obviously we must limit our conception of commercial law much more narrowly for the purposes of the project under consideration. Whatever may be desirable ultimately, commercial paper, sea law, including marine insurance, sales to the extent that international sales are involved, and possibly international railway transportation, are the only subjects upon which a consensus of opinion might reasonably be expected at present. Indeed, it is doubtful whether a Pan-American law of international railway transportation would be possible. The conditions would have to be the same in North America, Central America and in South America before uniform legislation for

[44] Handelsgesetzbuch, §§ 1-3.
[45] Cosack, Lehrbuch des Handelsrechts, 6 ed.

the continent would be advisable. It is very likely that upon that subject three schemes of legislation may have to precede an ultimate unity. For a long time to come, corporations, banks, life and fire insurance and kindred subjects will be influenced powerfully by local conditions. As they become more perfect, as they reflect better the local commercial needs they will of necessity become more and more universal. We are told that the three factors in the recognition of social standards in law and legislation are custom, reconciliation of custom with custom, or of law with law, and statute.[46] We had once a more or less universal *lex mercatoria*. Local law everywhere took the subject in hand and broke it down. The process of reconciliation by juristic speculation and by comparative jurisprudence is going on. It has a long way to go on, before the several states shall have proved all things to the end that legislation may hold fast that which is good.

Within the more limited field suggested, however, the sociological movement in politics and the sociological school in jurisprudence are laying a foundation upon which a project of uniformity may rest. The conception of adaptation of the law to human ends instead of deduction of rules from abstract legal conceptions, which is working a revolution in legal thought, must tend everywhere to mould the rules of commercial law to the demands of the practical course of business the world over. Even more than this, scientific discussions in congresses and conventions, bringing out the needs of trade in particular localities and by comparison enabling us to draw with assurance the line between the particular and the universal, will prepare the way rapidly for sound and practicable law-making. Out of such discussions there may well arise in the near future a Conference on Uniform Commercial Legislation composed of jurists, practicing commercial lawyers and men of affairs in due proportion, to give us step by step a scheme of Pan-American legislation on commercial subjects which may be a model not only to American legislators but for the world. Nowhere else will the two rival legal systems of the world be so well balanced. Nowhere else will the analytical conceptions of the Anglo-American jurist and the universal or, if you will, the natural-law conceptions of the Latin jurist be so equally represented. With each to act as a check upon the other, with each system to throw light upon the other in the handling of concrete problems, we may not unreasonably expect great results.

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[46] Sternberg, Allgemeine Rechtslehre, i, 26, 27.